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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 623

L. B. BINION, ALIAS BENNY BINION, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 19–32) and the *per curiam* opinion of the Court of Appeals (R. 241) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 6, 1953 (R. 242), and the petition for rehearing was denied on January 26, 1953 (R. 243–244). The petition for a writ of certiorari was filed on February 25, 1953. The jurisdiction of this Court is invoked under 28

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U. S. C., Section 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the order of a federal district court in Nevada, directing that petitioner be removed to Texas for trial there on an indictment pending in a federal district court in Texas, is appealable.

2. If so, whether the court below erred in holding petitioner's appeal to be frivolous on the merits.

RULE INVOLVED

FEDERAL RULES OF CRIMINAL PROCEDURE:

RULE 40. COMMITMENT TO ANOTHER DISTRICT; REMOVAL.

* * * * *

(b) *Arrest in Distant District.*

* * * * *

(3) *Hearing; Warrant of Removal or Discharge.* The defendant shall not be called upon to plead. If the defendant waives hearing, the judge shall issue a warrant of removal to the district where the prosecution is pending. If the defendant does not waive hearing, the commissioner or judge shall hear the evidence. If the commissioner hears the evidence he shall report his findings and recommendations to the judge. At the hearing the defendant may cross-examine witnesses

against him and may introduce evidence in his own behalf. If it appears from the commissioner's report or from the evidence adduced before the judge that sufficient ground has been shown for ordering the removal of the defendant, the judge shall issue a warrant of removal to the district where the prosecution is pending. Otherwise he shall discharge the defendant. If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment. If the prosecution is by information or complaint, a warrant of removal shall issue upon the production of a certified copy of the information or complaint and upon proof that there is probable cause to believe that the defendant is guilty of the offense charged. If a warrant of removal is issued, the defendant shall be admitted to bail for appearance in the district in which the prosecution is pending in accordance with Rule 46. After a defendant is held for removal or is discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.

* * * * *

STATEMENT

On October 3, 1952, an indictment in two counts was returned against petitioner in the United States District Court for the Northern District of

Texas, charging him with wilful attempted evasion of his own and his wife's income taxes for the year 1948 in violation of Section 145 (b) of the Internal Revenue Code (26 U. S. C., 1946 ed., Section 145 (b)). The indictment alleged that petitioner had filed false and fraudulent income tax returns showing a net loss of $8,744.63 for himself and his wife during the year 1948, whereas he well knew that they actually had a net taxable gain of $67,624.97 and should have paid income taxes of $25,096.20. It was further alleged that these fraudulent returns had been filed with the Collector of Internal Revenue at Dallas, Texas. (R. 6–8.)

On October 9, 1952, the United States Attorney filed an application for a warrant of removal in the United States District Court for the District of Nevada. (R. 3–5.) The application, which was accompanied by a certified copy of the Texas indictment, stated that an arrest warrant had been issued pursuant to the indictment and that petitioner had been arrested under authority thereof within the District of Nevada. The application requested the issuance of a warrant directing the removal of petitioner to the Northern District of Texas for further proceedings under the indictment. (R. 3–6.) After a hearing on November 13 and 14, 1952 (R. 109–180), the warrant of removal was issued on November 15, 1952 (R. 33–34). Petitioner's appeal from this order

(R. 36–37) was dismissed by the Court of Appeals on two grounds: (1) that such an order of removal is not appealable; and (2) that, in any event, the appeal is frivolous on the merits (R. 241–242).

Rule 40 of the Federal Rules of Criminal Procedure defines the procedure governing removal of accused persons to another district. Rule 40 (b) (3) provides, in pertinent part:

> * * * If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment. If the prosecution is by information or complaint, a warrant of removal shall issue upon the production of a certified copy of the information or complaint and upon proof that there is probable cause to believe that the defendant is guilty of the offense charged.

At the removal hearing in this case the Government introduced in evidence the certified copy of the Texas indictment (R. 119–120) and showed that petitioner was the person named therein (R. 122–123). This evidence was not disputed.

Petitioner made an offer of proof, however, which he alleged would show that the Texas indictment was politically motivated and was the result of connivance between the Attorney General of the United States and officials of the State of Texas. He offered to show that he

had been a resident of Nevada since 1946 (R. 126); that some four years later he was indicted by the State of Texas for gambling violations but that extradition was refused by the State of Nevada (R. 126–128); that subsequently, as the result of a very rigorous investigation by the Bureau of Internal Revenue and officials of the State of Texas covering the years in which he had filed income tax returns in Dallas, an indictment was returned against him on May 2, 1952, in the United States District Court for the Northern District of Texas charging wilful attempted evasion of income taxes amounting to approximately $14,000 for the year 1949 (R. 128); that upon his agreement to plead *nolo contendere,* and with the consent of both United States Attorneys, the case was transferred to the United States District Court for the District of Nevada under Rule 20 of the Federal Rules of Criminal Procedure (R. 128–129); that the Attorney General of the United States, at the instigation of Texas state officials, endeavored unsuccessfully to have the case retransferred (R. 129–131); that on September 3, 1952, petitioner was fined and placed on probation for five years, despite the Government's request that he be sentenced to prison[1] (R. 131); that on September

[1] Petitioner states (Pet. 5; cf. R. 131) that Government counsel recommended a prison term "solely for the purpose of permitting the Texas State authorities to place a hold order upon him * * *." There is no support for this state-

10, 1952, the Attorney General of the United States and an official of the State of Texas held a conference at which the subject of petitioner's income taxes for the year 1948 was discussed (R. 131–134); that the case was not handled in the normal manner and petitioner's attorneys were not accorded a promised conference in the Department of Justice prior to the presentation of the case to the grand jury (R. 135–136); and that the judge who impaneled the grand jury called their attention to a recent series of gangster killings, with which petitioner's name had been linked, and told them that, as in the case of Al Capone, the income tax laws provided a possible method for punishing such people (R. 152–154). Counsel for petitioner argued that they would be able to prove that the sole purpose of the present indictment was to bring petitioner to Texas for surrender to the state authorities[2] (R. 150, 154, 162–163); that there was no probable cause for belief that petitioner had attempted to evade his income taxes for 1948 (R. 132); and that the

ment in the record. On the contrary, Government counsel stated that it was the general policy to recommend a prison term in criminal tax cases (R. 97–98), and that such a recommendation was made in this case after consideration of petitioner's background and reputation and the amount of the understated income (R. 98).

[2] During the course of the argument Government counsel stated that (R. 163) "not only does the Federal Government feel it has an offense here, but the Federal Government has every intention of prosecuting this man for [violation of] the very statute under which we are seeking his removal."

indictment was a political persecution motivated by the fact that there was a presidential campaign in progress and Texas was a doubtful state (R. 126, 150–152, 154, 162–163, 165).

The District Court refused petitioner's offer of proof, holding that under Rule 40 of the Federal Rules of Criminal Procedure, a certified copy of an indictment conclusively establishes probable cause, and that removal is mandatory upon production of such certified copy and proof that the defendant is the person named in the indictment. (R. 20–32, 180–196.)

ARGUMENT

1. Petitioner concedes, as he must, that "in the ordinary case, without complications, Federal courts have usually held that a removal order is interlocutory in nature and not subject to appeal." (Pet. 10.) Indeed, the cases cited in the petition show that this rule is without exception, and that no federal appellate court has held that an otherwise nonappealable removal order is rendered appealable because of alleged "special circumstances." *Edelstein* v. *United States,* 97 F. 2d 271 (C. A. 3), certiorari denied, 305 U. S. 617; *Wood* v. *Cooper,* 18 F. 2d 535 (C. A. 8), certiorari denied, 274 U. S. 750; *Fries* v. *United States,* 284 Fed. 825 (C. A. 9); *Murray* v. *United States,* 273 Fed. 522 (C. A. 2). Cf. 28 U. S. C. 2253.

Petitioner contends, nevertheless, that the order in this case is appealable because it not only determined that he must return to Texas for trial on the federal indictment, but also irrevocably subjected him to arrest and trial by the State of Texas on a state offense. He argues (Pet. 8, 9, 10–13) that this particular removal order should be treated as falling within that "small class" of orders which "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 545–547.

Petitioner's argument is faulty, both in its assumptions as to the nature and effect of the removal order here involved and in its analysis of the pertinent legal authorities. The only question before the federal district court for Nevada in this proceeding was whether, under Rule 40 (*supra*, p. 2), "sufficient ground has been shown for ordering the removal of the defendant * * *." Where the prosecution is by indictment, as in this case, this is conclusively established by production of a certified copy of the indictment and by proving that the defendent is the person named therein. The district court's order here determined only that petitioner must return to the Northern District of Texas to stand trial on the federal indictment pending there (R. 33–34),

and he is at present at liberty on bond to the federal court on condition that he appear to answer the charge when ordered to do so (R. 34–36). The only issue presented at this stage of the case is whether petitioner should return to the jurisdiction of the federal district court for the Northern District of Texas, where the Government intends to try him under the indictment pending in that court.

The district court's order does not necessarily subject petitioner to the jurisdiction of the Texas state court under the gambling indictment there pending against him. The federal court has already taken jurisdiction over his person, and the state court cannot interfere until that jurisdiction has been exhausted. "The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy, to attain which it assumed control, before the other court shall attempt to take it for its purpose." *Ponzi* v. *Fessenden,* 258 U. S. 254, 260; cf. *Covell* v. *Heyman,* 111 U. S. 176; *Ableman* v. *Booth,* 21 How. 506. The federal indictment may not be dismissed by the Government without the consent of the district court in Texas. Rule 48 (a), Federal Rules of Criminal Procedure. That court may protect its jurisdiction over the person of petitioner by the issuance of any appropriate writ.

United States v. *Conley,* 80 F. Supp. 700, 701–703 (D. Mass.). And should any substantial question arise as to violation of petitioner's constitutional rights, habeas corpus would, of course, be available in the district where he is detained at the time of such alleged violation. Cf. *United States* v. *Reing,* 191 F. 2d 297, 300 (C. A. 3), certiorari denied 343 U. S. 909. The Attorney General could surrender petitioner to the appropriate state officials of Texas for trial under the state indictment only "if he finds it in the public interest to do so * * *." 18 U. S. C., Section 4085 (a); cf. *Ponzi* v. *Fessenden, supra,* pp. 261–266. Petitioner's apprehensions as to his possible prosecution for the Texas state offense are thus premature, and can furnish no basis upon which to obtain appellate review now of what is essentially an interlocutory, non-appealable order of removal, which is necessary to enable the federal district court in Texas to try him under the indictment pending in that court.

The cases upon which petitioner relies to establish the appealability of this particular removal order cannot bear the weight he places on them. In each, the legal or constitutional right claimed by the appellant had not been raised prematurely, as here, and had been definitively and finally determined by the order from which the appeal was taken. In *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541, the appellant's claim was

that the plaintiff in a pending suit should be required to post an indemnity bond, and his motion to require the bond had been denied. In *Stack* v. *Boyle,* 342 U. S. 1, the appellants' motion for reduction of bail pending trial had been denied. In *United States* v. *Cefaratti* (C. A. D. C.), decided November 6, 1952, certiorari denied, No. 534, March 9, 1953, the defendant's motion to suppress vital evidence had been granted, thus destroying the Government's case. In all of these cases the district court's ruling was a final determination of a legal right directly in issue, and asserted at the proper time. In this case, however, the right which petitioner claims is being violated by the removal order is the alleged "right given him by the asylum state of Nevada to resist extradition to Texas for trial on a state indictment." (Pet. 10.) As has been shown, that right, if any, was not in issue before the district court; it was being asserted prematurely, and it was neither directly nor finally determined by the removal order, the only effect of which is to compel petitioner to stand trial in Texas on the federal indictment. If and when petitioner should be deprived of any federal constitutional right, he will be able to assert it at such time and in the district where it occurs. *United States* v. *Reing, supra.*

2. The district court correctly held that, since the Government had produced a certified copy of

the indictment and had proved that petitioner was the person named therein, the order of removal should issue. The court relied upon the language of Rule 40 of the Federal Rules of Criminal Procedure and upon the Advisory Committee's notes to that rule.

In so far as pertinent to the present case,[3] Rule 40 (b) (3) provides:

> * * * if the prosecution is by indictment, a warrant of removal *shall issue* upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment. If the prosecution is by information or complaint, a warrant of removal shall issue upon the production of a certified copy of the information or complaint and upon proof that there is probable cause to believe that the defendant is guilty of the offense charged. * * * [Emphasis supplied.]

This clear provision of the rule that proof of identity and a certified copy of the indictment constitute "sufficient ground" for ordering removal of the defendant is emphasized in the Advisory Committee's notes. The Committee states:

> * * * The practice to be followed in removal hearings will depend on whether

[3] Paragraph (a) of Rule 40 in effect abolishes removal proceedings entirely when the defendant has been arrested in a nearby district. See notes of Advisory Committee on Rules.

> the demand for removal is based upon an indictment or upon an information or complaint. In the latter case, proof of identity and proof of reasonable cause to believe the defendant guilty will have to be adduced in order to justify the issuance of a warrant of removal. In the former case, proof of identity coupled with a certified copy of the indictment will be sufficient, as the indictment will be conclusive proof of probable cause. The distinction is based on the fact that in case of an indictment, the grand jury, which is an arm of the court, has already found probable cause. Since the action of the grand jury is not subject to review by a district judge in the district in which the grand jury sits, it seems illogical to permit such review collaterally in a removal proceeding by a judge in another district.

Petitioner nevertheless argues here (Pet. 8, 9, 13–17) that Rule 40 does not prevent him from going behind the indictment in the removal proceeding to show that it is a nullity.[4] No contention was made in the district court that the indictment failed to state a federal offense, or was a nullity for any reason apparent on its face. All petitioner offered to prove was that the

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[4] This does not seem to have been the contention in the district court. In fact, one of petitioner's counsel admitted that Rule 40 means what the Government says it does (R. 150–151), and the argument principally advanced there was that the rule is unconstitutional in this respect (R. 9–15).

then Attorney General had political motives in directing presentation of the case to the grand jury, that the case was handled in an unusual fashion in the Bureau of Internal Revenue, and that the district judge who impaneled the grand jury gave them a very emphatic charge.

Alleged malice of the prosecutor, as well as alleged departure from "normal procedure" in preparing a case for prosecution (see Pet. 16), are completely irrelevant to the validity of an indictment,[5] so long as it is based upon sufficient evidence properly presented. In any event, the clear language of Rule 40 forbids inquiry into the motives and preliminary investigative procedure underlying the indictment.

Petitioner contends, further (Pet. 8, 9, 17–23), that Rule 40 is unconstitutional if construed as creating a conclusive presumption of probable cause upon the production of an indictment. But he admits that this Court has already decided that there is no constitutional right to any hearing before removal from one federal district to another. In *United States ex rel. Kassin* v. *Mulligan,* 295 U. S. 396, 400, it was held:

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[5] The charge to the grand jury was, in any event, not improper. A district judge may be very emphatic in pointing out public evils so long as he does not interfere with the function of the grand jury to decide whether, and whom, to indict. *United States* v. *Buck*, 18 F. Supp. 213, 221 (W. D. Mo.), affirmed *sub* nom. *Walker* v. *United States*, 93 F. 2d 383 (C. A. 8), certiorari denied, 303 U. S. 644.

> There is no constitutional right to a hearing in advance of removal. Undoubtedly, Congress has power to direct that accused persons be taken, immediately and without hearing, before the court for trial. *Hughes* v. *Gault,* 271 U. S. 142, 149, 152.

The Court went on to point out that Congress had given a statutory right to a hearing to prevent hardship and injustice, and that, under the law as it then stood, the production of an indictment constituted a *prima facie* showing of probable cause requiring removal unless rebutted by convincing evidence that the prosecution was baseless. *United States ex rel. Kassin* v. *Mulligan, supra,* at 400–401. The law at present, as declared in Rule 40, is clear and unambiguous: the indictment is conclusive proof of probable cause.

CONCLUSION

The decision below is correct, there is no conflict of decisions, and no question of substance warranting review by this Court is presented.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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